

NO-FAULT COMPENSATION AND UNLOCKING TORT LAW'S "RECIPROCAL NORMATIVE EMBRACE"

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The purpose of this article is to explain how the principle of corrective justice has been displaced by the provision of no-fault compensation for personal injuries. In explaining the transition from tort liability for personal injuries to no-fault compensation, the aim is to identify the norms that are adhered to, and the norms that are abandoned, under either scheme. The explanation unfolds through three sections. Section 2 examines the principled basis for a no-fault compensation scheme that is formulated in the Woodhouse Report. Section 3 then turns to consider how, in the absence of a no-fault compensation scheme, the principle of corrective justice imposes an agent-relative duty of reparation on those responsible for causing a wrongful loss. Section 4 then considers how the duty of reparation can be discharged by a third party when we reconfigure our conception of "wrongful loss" and considers the implications of the reconfiguration for the fault principle. Viewing the transition from tort law actions to no-fault compensation in this way enables us to appreciate how a "normatively significant connection between actions and their outcomes" is severed through the reconfiguration of "wrongful loss".

1. Introduction

Before long, the 50th anniversary of the Woodhouse Report will be upon us.¹ The Woodhouse Report, and the subsequent statutory scheme for the compensation of personal injuries on a no-fault basis that the Report led to, is a much-celebrated component of the New Zealand legal system.² As a result of the statutory scheme, Sir Geoffrey Palmer suggests, "the corrective justice analysis that an individual whose autonomy has been invaded ought to have it restored and paid for by the person who caused it holds no sway" in the minds of New Zealand people.³ This may be true, in which case the normative force of the principle of corrective justice has somehow been displaced. An explanation is therefore required of how the principle of corrective justice has been displaced by the provision of no-fault compensation for personal injuries.

The purpose of this article is to provide such an explanation. There are a number of simple explanations that could be provided; "by legislation" is one simple response; "by the principle of distributive justice" is another. Here, I am concerned with providing a further explanation. I will suggest that the principle of corrective justice can be displaced when we reconfigure a "loss" that a person suffers as wrongful *vis-à-vis* the community-at-large rather than a loss that is wrongful *vis-à-vis* a person's wrongdoing. No-fault compensation schemes are therefore concerned with losses that are "wrongful" as measured against a

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1 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967).

2 Accident Compensation Act 2001.

3 Geoffrey Palmer "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 UTJ 223 at 247.

standard of “wrongfulness” that is independent of any actions that caused the loss. This is also a simplistic answer (that invites even further explanation). However, viewing the transition from tort law actions to no-fault compensation in this way enables us to appreciate how a “normatively significant connection between actions and their outcomes” is severed through the reconfiguration of “wrongful loss”.⁴

Moreover, this simplistic answer is nonetheless sophisticated enough to engage in two related debates. On one front, I argue that the Woodhouse Report was mistaken in its criticism of “the fault principle”. The Report argues that the underlying philosophy of tort law actions is “illogical”, and such defects motivate the move away from tort law actions towards a statutory no-fault compensation scheme for personal injuries.⁵ I contend here that, although our move away from tort law actions as the remedial response to wrongfully-occasioned personal injuries may be sensible (and even praiseworthy) all things considered, it is nonetheless at the expense of sound principles of tort law. This contention opens up a second front to defend: the view that no-fault compensation schemes are pursuant to a principle of distributive justice that comes at the expense of the principle of corrective justice. This is the “abandonment view” that has recently been subject to criticism.⁶ By mapping the transition from tort liability for personal injuries to no-fault compensation this article aims to identify the norms that are adhered to, and the norms that are abandoned, under either scheme. It is then possible to appreciate the contrast between the schemes in clearer philosophical terms.

This argument unfolds through three sections. Section 2 examines the principled basis for a no-fault compensation scheme that is formulated in the Woodhouse Report. From this examination we can identify the discarded norms of objective duties and outcome responsibility. Section 3 then turns to consider how, in the absence of a no-fault compensation scheme, the principle of corrective justice imposes an agent-relative duty of reparation on those responsible for causing a wrongful loss. Section 4 then considers how the duty of reparation can be discharged by a third party when we reconfigure our conception of “wrongful loss” and considers the implications of the reconfiguration for the norms of objective and outcome responsibility.

So, before the Law Commission retrieves its bunting from storage, and before we heap praise on the Woodhouse Report and our scheme for accident compensation, let us first return to the recommendations in the Report and then allow me to momentarily revive the idea of corrective justice.

4 Stephen R Perry “The Moral Foundations of Tort Law” 77 *Iowa L Rev* (1992) 449 at 497.

5 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [78]: “There are four principal criticisms of the common law action. They describe the philosophy upon which it depends as illogical, the verdicts as entirely uncertain and affected by mere chance, the procedure as costly and slow moving, and the nature of the award and the whole process as an impediment to rehabilitation”.

6 S Connell “Justice for Victims of Injury: The Influence of New Zealand’s Accident Compensation Scheme on the Civil and Criminal Law” (2012) 25 *NZULR* 181 at 181: “Abolishing damages for personal injury and replacing them with the redistributive ACC scheme was a significant step in the pursuit of distributive justice. The orthodox view is that the introduction of ACC was an abandonment of corrective and retributive justice in favour of distributive justice. I will argue that the law continues to pursue corrective and retributive justice for injury victims”. Note: ACC is the New Zealand Accident Compensation Corporation.

2. The Woodhouse Report

To start, consider a series of basic private law scenarios:

- (1) D_1 , through his own poor note-keeping, publishes an untrue statement in a newspaper column about P_1 that damages P_1 's reputation.
- (2) D_2 , through the use of novel but defective materials, insulates P_2 's home in a way that traps moisture, thereby damaging the timber framing of P_2 's home.
- (3) D_3 , by being momentarily distracted whilst driving, damages P_3 's bicycle beyond repair.
- (4) D_4 , through his own poor note-keeping, performs a sterilisation procedure on P_4 , erroneously believing that it was one of a number of procedures sought by P_4 .
- (5) D_5 , through the use of novel but defective materials, insulates P_5 's home in a way that (as a specific series of events) allows airborne insulation fibres to cause P_5 to suffer a respiratory disease.
- (6) D_6 , by being momentarily distracted whilst driving, seriously injures a cyclist, P_6 .

In New Zealand, D_4 , D_5 , and D_6 are treated differently from D_1 , D_2 and D_3 . Under a no-fault compensation scheme for personal injuries occasioned by accident, the costs of P_4 's, P_5 's, and P_6 's physical recovery would be covered by the compensation scheme.⁷ As a corollary, P_4 , P_5 , and P_6 are unable to bring an action in tort law against D_4 , D_5 and D_6 .⁸ In comparison, actions for defamation and negligence would be available to P_1 , P_2 , and P_3 for them to claim damages against D_1 , D_2 , and D_3 .

The no-fault compensation scheme originates from the recommendations of the Commission of Inquiry into Compensation for Personal Injury in New Zealand that were published in the Woodhouse Report. The Report recommended a scheme that:⁹

... would provide immediate compensation without proof of fault for every injured person, regardless of his or her fault, and whether the accident occurred in the factory, on the highway, or in the home.

This recommendation is based upon a combination of discontent with the existing tort law actions for personal injury as well as a zeal for extending the existing statutory system of workplace injury insurance to every citizen who suffers a personal injury. The reasoning that informs The Report's discontent and zeal is multi-faceted.¹⁰ Here, I wish to focus on the moral principles that underlie both tort law actions and the statutory compensation schemes (leaving aside for now the other facets of the Woodhouse Report and the other possible rationales for no-fault compensation schemes).

7 Accident Compensation Act 2001, s 20.

8 Accident Compensation Act 2001, s 317.

9 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [18].

10 The facets include moral precepts of justice and equity, the economic analysis of the cost of personal injuries, findings on the administrative and procedural efficiencies of systems of compensation, and analyses of injury prevention and recovery.

According to the Woodhouse Report, the first and fundamental principle is that of community responsibility.¹¹ The principle is premised upon two norms. The first is a reciprocity norm:¹²

Just as modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity.

The contention is that, to the extent that the community benefits from a productive work force, the community ought to reciprocate by absorbing the disbenefit of physical incapacity in the work force.

The second stage of the argument then advances a broader risk-distribution norm:¹³

... since we all persist in following community activities, which year by year, exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims.

This further contention is subtly different: given that we all engage in "community activities", and given that these activities raise a risk of personal injury, we *ought* to distribute the cost of the risk materialising equally throughout the participants in community activities.

The Woodhouse Report's principle of community responsibility rests "on a double argument" since the "ought" (italicised above) in the risk-distribution norm is otherwise unsupported unless we derive the "ought" from the reciprocity norm.¹⁴ In other words, the reason why we ought to distribute the costs to the community-at-large (rather than letting the costs fall as they may on individual participants in these activities) is because of the reciprocity norm (i.e. because the community benefits from the participation in these activities).

We can see the two norms of the community responsibility principle being woven together in Sir Owen Woodhouse's later description of the principle:¹⁵

... society itself ... has built up and encouraged the heavily risk-laden activities that exact a known and expected cost in life and limb ... it [is] imperative that we all should share in the burden that falls in so random a way upon those who do become the casualties.

The community responsibility principle therefore provides that, since society encourages, and derives utility from, risk-laden activities, and since risk-laden activities impose a random burden on some of the participants in the activities,

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- 11 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [56].
 - 12 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [56].
 - 13 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [56].
 - 14 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [56].
 - 15 Owen Woodhouse "Aspects of the Accident Compensation Scheme" [1979] NZLJ 395, at 396.

society ought to account for the burden by compensating the injuries suffered in the course of risk-laden activities.

The Report therefore views personal injuries occasioned by accidents as raising a question of distributive justice: given that there are benefits and burdens that arise from a set of activities, and given that the burdens (in particular) can rest on several different bearers, how should these burdens be allocated between the potential set of bearers?¹⁶ According to the Woodhouse Report, it is the "community" that "must protect all citizens ... from the burden of sudden individual loss".¹⁷

The alternative is to view personal injuries as either being wrongfully occasioned or occasioned without fault. Wrongfully-occasioned personal injuries engage a norm of corrective justice (and the losses from personal injuries occasioned without fault are left to fall where they may). In terms of wrongfully-occasioned personal injuries, between the person who caused the loss through his or her wrongdoing (D) and the person who suffers from the loss (P), "one of them has certain goods or ills from, or lost certain good or ills to, the other".¹⁸ Corrective justice requires an arithmetic correction through the addition or subtraction of gains or losses as between the two parties, with the aim of correcting the normative inequality between them that the wrongdoing occasioned.

In order to bring the two parties (P and D), and only the two parties, into the arithmetic equation, it is necessary to find fault or wrongdoing (in order to identify D) and identify a connected wrongful loss (in order to identify P). "The fault principle", simply put, provides that D's fault or wrongful conduct provides the basis for holding D responsible for the losses suffered by P that resulted from D's conduct.

In response to the fault principle in tort law actions, the Woodhouse Report advanced two principled objections. The first objection concerned the objective standard of fault-based liability. According to the Report:¹⁹

... the moral basis for the application of the fault principle cannot be explained in terms of the legal conception of negligence because the test for negligence is objective and impersonal.

A finding of fault only requires an objective assessment of the conduct of D. Hence, $D_1, D_2 \dots D_6$ are all *at fault* in the sense that their conduct fell below

16 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) L & Phil 1 at 9: "Norms of distributive justice are to be understood on the 'geometric' model of division. There are several potential holders of certain goods or ills and the question is how to divide the good or ills up among them" citing Aristotle, *Nicomachean Ethics* [1131b 12–15].

17 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [55].

18 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) L & Phil 1 at 9: "Norms of corrective justice ... are to be understood on the 'arithmetic' model of addition and subtraction. Only two potential holders are in play at a time. One of them has gained certain goods or ills from, or lost certain goods or ills to, the other. The question is whether and how the transaction should be reversed, undone, counteracted" citing Aristotle, *Nicomachean Ethics* [1132a 1–6].

19 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [82].

what we reasonably expect from journalists, insulators, drivers, or surgeons. The Woodhouse Report was concerned that "[n]egligence is tested not in terms of the state of mind or attitude of the actual defendant, but impersonally against the ... performance of a theoretical individual"²⁰ and unless conduct "reflects a subjective and moral attitude" it "can hardly deserve moral censure".²¹ Hence, according to the Woodhouse Report, "it is really not possible to equate negligence as an independent tort with moral blameworthiness".²²

Yet, an objective finding of fault does not purport to also identify instances of moral blameworthiness; conduct that is wrongful (with regards to an objective standard) does not necessarily attract moral censure. As MacCormick explains:²³

... every person has a right to be secure from harm to person or possessions caused by any lapse from a reasonable standard of care and attentiveness on the part of any other person. To respect such a right entails acceptance that an obligation of reparation is incumbent on a person responsible for an infringement of another's right, *regardless of his being morally at fault or blameworthy in the matter.*

Rather than attracting moral censure, a finding of fault attracts a duty or "obligation of reparation". It is because D deviated from an objective standard of conduct that infringed a right of P, D is responsible for P's losses and ought to repair or correct P's loss. If D does not correct the loss, perhaps then he would be morally blameworthy and culpable,²⁴ but the mere "existence of an obligation of reparation is not necessarily conditional upon [moral] fault or blameworthiness" of D.²⁵ Careless note-taking, the use of defective materials, or moments of inattention whilst driving, are instances of fault or wrongdoing by D. If we limit ourselves to assessing objectively the conduct of D, the Woodhouse Report is correct that we cannot unilaterally equate D's conduct with moral blameworthiness. We can, nonetheless, say that D's wrongdoing has normative consequences in the form of a duty or obligation of reparation. Hence, we can explain the "moral basis for the application of the fault principle" in terms of P's "right to be secure from harm to person or possessions caused by any lapse from a reasonable standard of care and attentiveness". We do not need to allocate moral blame upon, or direct moral censure toward, D.

More fundamentally, there is a distinction between "doing the wrong thing" and "doing something wrongful"; a distinction that "is of pervasive importance

20 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [87].

21 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [88].

22 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [87].

23 D N MacCormick "The Obligation of Reparation" (1978) 78 Proceedings of the Aristotelian Society 175 at 183 [emphasis added].

24 D N MacCormick "The Obligation of Reparation" (1978) 78 Proceedings of the Aristotelian Society 175 at 176: "to say that there is an obligation of reparation is to imply that it *would* be blameworthy [conduct] if [the obligation was] subsequently ... refused or neglected".

25 D N MacCormick "The Obligation of Reparation" (1978) 78 Proceedings of the Aristotelian Society 175 at 176: "fault or blame in the *moral* sense are not conditions of the obligation of reparation".

in most developed legal systems".²⁶ "Wrongdoing", "doing something wrongful", "or acting wrongfully", Gardner explains, "is the breach of a duty, and a duty ... is a reason with doubly special categorical and mandatory force".²⁷ In comparison, "to do the wrong thing" is to do something unjustifiable (that is, contrary to reasons for action, all things considered). It is possible, therefore, to do something wrongful (breach a duty) without doing a wrong thing (act unjustifiably) since the breach of duty may be excusable, justifiable or defeasible, all things considered.

The fault principle merely provides an objective standard of conduct. Although a failure to live up to this standard is wrongful (a breach of duty), and has normative consequences in the form of the duty of reparation, the fault principle does not identify whether the action (that was in breach of the duty) was the wrong thing to do. Since the fault principle is concerned with reparation rather than the moral culpability, it is not a valid criticism of the fault principle that the objective assessment of conduct cannot be equated with moral blameworthiness.²⁸

The Woodhouse Report's second objection to the fault principle is that:²⁹

The extent of liability is not measured by the quality of the defendant's conduct, but by its results. Reprehensible conduct can be followed by feather blows while a moment's inadvertence could call down the heavens.

This objection touches upon a characteristic common to questions of moral responsibility and legal liability. That is, given that we are held responsible for the consequences of our conduct (to a particular extent, see below), and given that the consequences of our conduct are informed by factors beyond our control, it then follows that our responsibility is adjudged with reference to some factors that are beyond our control. For instance, D_3 damaged a bicycle beyond repair. Because of D_3 's wrongdoing, D_3 is responsible and liable for the loss suffered by P_3 . The same moment of inattention whilst driving can fortuitously cause no loss at all, or attract responsibility for vastly different amounts of loss (since the value of the bicycle could range from priceless to worthless).³⁰ The more complex the scenario, the greater variation in outcomes that D may be held to be responsible for. For instance, D_2 was unable to control the unseasonably wet winter that aggravated the defect in the insulation method, nor was D_2 able to control the

26 John Gardner "Wrongs and Faults" in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005) 51 at 55.

27 John Gardner "Wrongs and Faults" in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005) 51 at 55–57.

28 Compare S Connell "Justice for Victims of Injury: The Influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law" (2012) 25 NZULR 181 at 185: "The introduction and expansion of the tort of negligence allowed the common law to provide compensation to an increasing proportion of injury victims, at the cost of its corrective justice credentials. The objective standard of care meant that defendants could be held responsible for inadvertent acts or omissions which can be challenging to describe as moral wrongdoing" and at 192: "the law of torts is concerned to some extent with responding to wrongdoing: punishing wrongdoers, deterring wrongful conduct, marking society's disapproval and so on".

29 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [85].

30 See Jeremy Waldron "Moments of Carelessness and Massive Loss" in David G Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1997) 387.

extent to which the damage to the framing caused a series of further defects to the building, and so on. Nonetheless, such outcomes provide the basis upon which we assess and measure D_2 's and D_3 's responsibility for acting wrongfully.

The Woodhouse Report is concerned that damages under the fault principle can "become disproportionate to the conduct which is said to justify them".³¹ Instead of the extent of D's liability being determined by D's blameworthiness or culpability (because of the objective assessment of fault), the extent of D's liability is informed by the combination of wrongful conduct and factors beyond D's control. The extent of D's liability comes down, in part, to "luck".

A lot can be said about this apparent problem. Here, I will limit myself to two and a half brief points (that have all been developed elsewhere).³² First, as a preliminary point, consider how the focus of the law is on the negative consequences of actions.³³ This leaves us with an incomplete overall evaluative picture. If every action embodies a risk (insofar as our actions engage factors that are outside of our agency that nonetheless inform the outcome of our actions) then an action may have positive consequences that the agent D is responsible for (can take credit for) despite some causal factors being outside of the agent's control. For instance, D_1 or D_4 may benefit from the reputation of being an efficient and industrious professional who does not "get tied up with paper work and excessive note taking", D_3 or D_6 may benefit from arriving at their destination on time after overtaking a slow-moving cyclist, D_2 or D_5 may profit from the reduced costs of their innovative insulation material. If we stand by the objection that D should not be held responsible for the negative consequences of D's actions that are informed by factors that are outside of D's agency, then we should equally refuse to credit D with the positive consequences of D's actions that are informed by factors that are outside of D's agency.

Second, and more fundamentally, if we are unwilling to hold D responsible for the negative consequences of D's actions that are informed by factors that are outside of D's agency, then our ability to legally adjudge or morally appraise D's conduct begins to dissolve entirely. That is, if we subtract away every eventuality that follows from an action (because it is tainted by factors external to D's agency) and if we subtract away every component part of an action (since that too can be tainted by external factors), then we have removed D's agency from the equation. As Nagel argues, "the area of genuine agency, and therefore of legitimate moral judgment, seems to shrink under this scrutiny

31 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [85].

32 B Williams and T Nagel "Moral Luck" (1976) 50 *Proceedings of the Aristotelian Society*, Supplementary Volumes 115; Jeremy Waldron "Moments of Carelessness and Massive Loss" in David G Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1997) 387; AM Honoré "Responsibility and Luck: the Moral Basis of Strict Liability" (1988) 104 LQR 530; John Gardner "Obligations and Outcomes in the Law of Torts" in Peter Cane and John Gardner (eds) *Relating to Responsibility* (Hart Publishing, Oxford, 2001) 111.

33 AM Honoré "Responsibility and Luck: the Moral Basis of Strict Liability" (1988) 104 LQR 530 at 106–111; John Gardner "Obligations and Outcomes in the Law of Torts" in Peter Cane and John Gardner (eds) *Relating to Responsibility* (Hart Publishing, Oxford, 2001) 111 at 132: "Action is by its nature a gamble, [Honoré] says: some you win, some you lose. Facing liability when you lose is only half of the story of outcome responsibility; the other half includes all the positive normative consequences (admittedly mostly laid on extra-legally) that flow from doing what you do successfully".

of an extensionless point".³⁴ It is because, Gardner explains, "agency *does* have some reach and moral judgment *does* have some area of application" that our responsibility for wrongdoing is assessed with reference to the outcomes of our actions.³⁵ In other words, if we aim to legally adjudge or morally appraise an agent, it is necessary for the judgment or appraisal to be about *something*. The something at issue is his or her conduct and impact on the world, and moreover, it is his or her conduct and impact which constitutes his or her agency. Otherwise, our point of scrutiny becomes "extensionless" or our judgment has no "area of application".

We will nonetheless disagree about whether D should be held to be responsible (be held to account for) all the eventualities that follow from D's conduct. We disagree because we have different boundary markers between the eventualities and consequences that are unfortunate and unlucky (and thereby beyond the appropriate scope of responsibility) and which eventualities and consequences that we ascribe to D's conduct. The half-point is that this disagreement is a disagreement about the acceptable "baseline" of "responsibility" *vis-à-vis* "luck".³⁶ As discussed further below, the "baseline" or "boundary markers" of someone's outcome responsibility will be informed by the moral norm that governs D's conduct and renders D's conduct as "wrongful". The moral norm that governs D's conduct will inform which outcomes we hold D to be responsible for.

The Woodhouse Report's principled objections took issue with the fault principle's objective assessment of wrongdoing and imposition of responsibility for outcomes. The two objections, I have suggested, are unfounded. In terms of the objective assessment of conduct, I have suggested that since "doing something wrongful" (breaching of duty) is distinct from "doing the wrong thing" (acting unjustifiably), "doing something wrongful" in breaching an objective standard of care does not engage questions of moral blameworthiness or censure. It is no criticism, therefore, to suggest that an objective standard of fault cannot be equated with moral wrongdoing. In terms of outcome responsibility, I have suggested that as a necessary feature of assessing conduct, "doing something wrongful" will attract responsibility for outcomes that are informed by factors beyond the wrongdoer's control.

34 B Williams and T Nagel "Moral Luck" (1976) 50 *Proceedings of the Aristotelian Society*, Supplementary Volumes 115 at 35: "If one cannot be responsible for consequences of one's actions due to factors beyond one's control, or for antecedents of one's acts that are properties of temperament not subject to one's will, or for the circumstances that pose one's moral choices, then how can one be responsible even for the stripped-down acts of the will itself, if *they* are the product of antecedent circumstances outside of the will's control? ... Everything seems to result from the combined influence of factors, antecedent and posterior to action, that are not within the agent's control".

35 John Gardner "Obligations and Outcomes in the Law of Torts" in Peter Cane and John Gardner (eds) *Relating to Responsibility* (Hart Publishing, Oxford, 2001) 111 at 128.

36 John Gardner "Obligations and Outcomes in the Law of Torts" in Peter Cane and John Gardner (eds) *Relating to Responsibility* (Hart Publishing, Oxford, 2001) 111 at 127-8: "There can be no such thing as a coherent general objection to our being exposed to moral luck ... For what counts as luck is always, Nagel shows, luck *only relative to some baseline or other* ... The problem with a general objection to our exposure to moral luck is that *everything* we do is entirely a matter of luck relative to *some* baseline or other ... it follows that to object to moral luck *tout court* is to object to morality *tout court*."

The effect of a statutory scheme for no-fault compensation of personal injuries is to replace the fault principle with a principle of community responsibility. We can therefore begin to understand why D_4 , D_5 , and D_6 are treated different to D_1 , D_2 , and D_3 in New Zealand. P_4 , P_5 and P_6 are compensated through a no-fault compensation scheme since their loss is a burden that the community has responsibility for. Cycling, surgery and home insulation are "risk-laden activities that exact a known and expected cost in life and limb" that are "undertaken for the convenience and utility of society".³⁷ Members of the community, through a compensation scheme, therefore "share in the burden" that fell upon P_4 , P_5 , and P_6 .³⁸ In comparison, the conduct of D_1 , D_2 and D_3 fell beyond the standard of conduct that we expect from journalists, insulators and drivers. Their conduct attracts an obligation to repair or correct the losses suffered by P_1 , P_2 and P_3 (without their conduct necessarily attracting moral censure).³⁹ Moreover, as a necessary feature of "moral judgment having some area of application",⁴⁰ the scope of their obligations to repair the losses suffered by P_1 , P_2 and P_3 may be determined by (fortunate or unfortunate) factors outside of their control.

We can now sharpen this contrast — between the fault principle and the principle of community responsibility — by first considering how the fault principle fits into the overarching principle of corrective justice, and then considering how a reconfiguration of "wrongful loss" renders the fault principle redundant.

3. *The duty of reparation*

In most jurisdictions, the remedial responses to our basic private law scenarios are structurally the same:

- (1) D_1 , and D_1 's newspaper, is required to print a retraction of the defamatory statement, and/or pay general damages to P_1 for P_1 's loss of reputation.
- (2) D_2 is required to pay the costs of replacing the defective insulation and repairing any damage to the building to P_2 .
- (3) D_3 is required to pay the costs of replacing P_3 's bicycle.
- (4) D_4 is required to pay damages for the costs of reversing the sterilisation procedure, as well as for general damages for distress and loss of reproductive autonomy, to P_4 .
- (5) D_5 is required to pay general damages to P_5 for the treatment of P_5 's respiratory disease, associated injuries and distress.
- (6) D_6 is required to pay general damages to P_6 for the injuries suffered following the collision.

The remedial response is the imposition of a duty of reparation. The structure of this remedial response is underscored by the principle of corrective justice. Corrective justice presupposes an equality between P and D (with regards to a

37 Owen Woodhouse "Aspects of the Accident Compensation Scheme" [1979] NZLJ 395 at 396.

38 Owen Woodhouse "Aspects of the Accident Compensation Scheme" [1979] NZLJ 395 at 396.

39 D N MacCormick "The Obligation of Reparation" (1978) 78 Proceedings of the Aristotelian Society 175 at 183.

40 John Gardner "Obligations and Outcomes in the Law of Torts" in Peter Cane and John Gardner (eds) *Relating to Responsibility* (Hart Publishing, Oxford, 2001) 111 at 128.

particular quality or pre-existing norm),⁴¹ the equality is displaced by a wrongful interaction or transaction between P and D, and corrective justice then requires the inequality to be "reversed, undone, counteracted".⁴² Hence, D₁'s retraction aims to reverse the effects of the defamatory statement about P₁, D₂'s payment enables P₂ to correct the defects in her home, D₃'s payment aims to replace P₃'s bicycle, and so on. The performance of the duty of reparation is a rebalancing of the equality between P and D.

The imposition of the duty of reparation on D can be explained in terms of private law's adherence to the principle of corrective justice. The imposition of this duty can be explained in a number of ways. Here I will outline the predominant explanations of the role of corrective justice that have been provided by Jules L Coleman, John Gardner and Ernest J Weinrib.

For Coleman, there are two norms that explain the duty of reparation: the elimination, rectification or annulment of wrongful or unjust losses (the annulment norm) and a "framework of rights and responsibilities between individuals" (the relational norm).⁴³ According to Coleman, the relational norm provides "reasons for acting we have as a result of our actions".⁴⁴ It therefore brings D, and only D, into the remedial equation. The basis of the duty on D to repair the "wrong" therefore follows from the relational norm since it connects the wrongdoer (D) with the wronged-person (P).

However, the relational norm, by itself, "denies the normative relevance of wrongful losses".⁴⁵ The annulment norm then complements the relational norm as the annulment norm "emphasizes the wrongful losses both as an aspect of corrective justice and as part of its point".⁴⁶ The content of the duty of reparation imposed on D is to rectify, annul or otherwise correct the wrongful losses suffered by P. The requirements of corrective justice are therefore a mixture of two "distinct duties" or norms: the relational norm generates reasons *for* D to act on the basis of D's wrongful actions and the annulment norm generates reasons for D to repair P's wrongfully-occasioned losses.⁴⁷ The wrongful losses suffered by P, in the form of reputation loss, a damaged home, a damaged bicycle, bodily injury, respiratory illness, or loss of fertility, engage the annulment norm and generate reasons for why those losses should be eliminated, rectified or corrected. D's wrongdoing — that is, wrongdoing with reference to a framework of rights

41 See EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 76: "Aristotle's corrective justice presupposes the equality of the two parties to a transaction. The problem is: in what respect are the parties equal? This question is fundamental. Corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours."

42 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) *L & Phil* 1 at 9.

43 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 435.

44 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 438.

45 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 438.

46 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 438.

47 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 441.

and responsibilities — generates reasons for the journalist, insulator, driver and surgeon to perform the duty of reparation.

Here, in clearest terms through the lens of Coleman's theory, we can view the two norms of objective duties and outcome responsibility coordinating to explain the principle of corrective justice. Singular focus on "the interaction between persons",⁴⁸ and the objective duties that ensue,⁴⁹ denies the normative relevance of the losses caused. To recognise the normative relevance of the losses caused by D requires recognition that D is responsible for the outcome of D's wrongful conduct.⁵⁰

For Gardner, the duty of reparation imposed on D can be explained with reference to a singular norm that can continue or persist beyond initial non-adherence to the norm. The relationship between D and P is governed by primary norms, such as P's right to be secure from harm to their person, possessions, reputation, and so on. According to Gardner, whilst D's wrongdoing violates these primary norms, "the obligation of reparation is grounded (comes into existence on the condition of and by reason of) this [primary] norm's violation".⁵¹ After non-adherence to the primary norm, it is still possible to adhere to some or all of the reasons for action that the primary norm was premised upon. We can therefore understand the duty of reparation as a continuation of such reasons for action. As Gardner succinctly explains:⁵²

The normal reason why one has an obligation to pay for the losses that one wrongfully occasioned ... is that this constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation.

The erroneous note-taking, the use of defective insulation materials, the inattention whilst driving, are all actions that led to a breach of a primary obligation (or primary norm). The duty to repair the losses that follow from the violation of the primary obligation represent the "best still available" way of conforming with the reasons for action that contributed to the "obligatoriness" of the primary norm.⁵³

Hence, even if we accept that the primary obligation is grounded "in terms of a [fair standard] as between" P and D,⁵⁴ and is therefore an objective standard,

48 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) *Oxford Journal of Legal Studies* 475 at 483.

49 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) *Oxford Journal of Legal Studies* 475 at 492.

50 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) *Oxford Journal of Legal Studies* 475 at 483: "personal responsibility and corrective justice are both different and incompatible. This is because personal responsibility focuses on an agent, typically the defendant in the legal context. To ask whether someone is personally responsible is to ask a question that focuses on that particular person. Corrective justice, on the other hand, focuses on the interaction between persons."

51 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) *L & Phil* 1 at 28.

52 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) *L & Phil* 1 at 33–34.

53 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) *L & Phil* 1 at 30.

54 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) *Oxford Journal of Legal Studies* 475 at 491.

the focus of the law shifts onto D insofar as the obligation of reparation is grounded in D's violation of the primary obligation. It becomes conceptually consistent, therefore, to apply objective standards whilst still pursuing an outcome responsibility norm.⁵⁵

Weinrib's account of P's entitlement to reparation has a similar structure. According to Weinrib's theory of corrective justice:⁵⁶

When the defendant ... breaches a duty correlative to the plaintiff's right, the plaintiff is entitled to reparation. This remedy reflects that fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff's right. The defendant's breach of the duty ... does not, of course, bring the duty to an end, for if it did, the duty would — absurdly — be discharged by its breach.

Central to this theory of corrective justice is the correlative relationship between P and D. For Weinrib, the Kantian "Right" — the "sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" — governs the bilateral relationship between P and D.⁵⁷ The "Right" provides (what is described above as) a primary norm. When D infringes the "Right", or primary norm, D obtains a normative gain and P suffers a normative loss. The gains and losses are *normative* gains and losses since they are measured *vis-à-vis* the "Right" or primary norm. It follows for Weinrib that "the normative gain and the normative loss are correlative to each other".⁵⁸ This correlativity "locks the plaintiff and defendant into a reciprocal normative embrace" and "highlights the moral reason for singling out the defendant for liability".⁵⁹ It is because of this "reciprocal normative embrace" that, when the defendant violates the primary norm, the defendant "violates a normative bond not with the world at large but specifically with the person to whom the defendant owed the duty".⁶⁰

The "sum of conditions under which the choice of one can be united with the choice of another" include a series of primary norms that protect P_1 from the publication of untrue statements that lower P_1 's reputation, P_2 from defective products being installed into P_2 's buildings, P_3 from damage to her bicycle, P_4 from the loss of natural fertility, and so on. When D violates one of these primary norms, and causes a loss to be suffered by P, D "remains subject to" the primary norm and the discharge of the duty of reparation "rectifies both the normative gain and the normative loss in a singular bipolar operation".⁶¹ This provides the abovementioned "baseline" or "boundary marker" for outcome responsibility. Whilst it is true that corrective justice "attributes no moral property to [D] in

55 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) Oxford Journal of Legal Studies 475 at 484: "the personal responsibility theorist needs to show that, despite appearances, the objective standard is consistent with personal responsibility".

56 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 135.

57 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 95.

58 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 136.

59 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 142–143.

60 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 143.

61 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 136.

isolation",⁶² D is nonetheless morally responsible for the outcome of his or her wrongful conduct *where* the baseline or boundary marker for responsibility is understood in terms of the "reciprocal normative embrace."⁶³ In other words, the extent of D's responsibility for his wrongful conduct is informed by the moral norm that governs D's conduct and renders D's conduct as "wrongful".

Note how, according to these theories of corrective justice, the duty of reparation is (or at least appears to be) an agent-relative duty. That is, a duty that is grounded in reasons for action that only apply to D, as the wrongdoer. According to Coleman's theory of corrective justice:⁶⁴

Corrective justice imposes on wrongdoers the duty to repair the wrongful losses their conduct occasions. Thus, it provides wrongdoers with reasons for acting that are peculiar to injurers in an *agent-relative sense*; to annul losses for which they are responsible.

It is the relational norm, you may recall, that provides "reasons for acting we have as a result of our actions".⁶⁵ The duty of reparation is therefore imposed on the wrongdoer *qua* their wrongdoing.

For Weinrib, the duty of reparation is also agent-relative. According to his theory, corrective justice necessitates a normatively-significant link between P and D. In essence, this is because the Kantian approach:⁶⁶

... links the interacting parties through a right, on the one hand, and a corresponding duty, on the other. The right represents the moral position of the plaintiff; the duty represents the moral position of the defendant. Right and duty — and therefore plaintiff and defendant — are connected because the content of the right is the object of the duty.

Since corrective justice, in Weinrib's theory, is concerned with normative gains and losses, the duty of reparation is imposed on D because of D's normative gain. As discussed further below, D's "gain" is not necessarily a factual gain (a material benefit). Rather, D's "gain" is a normative gain in terms of transgression from a norm that governs the fair terms of D's interaction with P.⁶⁷ It is in this way that D's normative gain is correlative with P's normative loss.

The duty of reparation that is imposed on D is therefore an agent-relative duty on the basis that: D is locked into the "reciprocal normative embrace" through the strict correlativity of normative gains and normative losses (Weinrib), the reasons that apply to D to adhere to a primary norm continue to apply to D after D's wrongdoing (Gardner), or, on the basis that the relational norm provides reasons for D to act as the result of D's actions (Coleman). More generally,

62 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) Oxford Journal of Legal Studies 475 at 492.

63 A Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28(3) Oxford Journal of Legal Studies 475 at 479: "if a person is morally responsible for an outcome, then it is morally appropriate to insist that person be held accountable for that outcome."

64 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 Iowa Law Rev 427 at 442 [emphasis added].

65 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 Iowa Law Rev 427 at 438.

66 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 123.

67 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 115–116.

the duty of reparation is imposed on D because of a "normatively significant connection between actions and their outcomes".⁶⁸

4. *Relative and absolute wrongful loss*

Consider some further facts in our basic private law scenarios:

- (1) Another newspaper, that has a similar readership to D_1 's newspaper, corrects the untrue statement about P_1 .
- (2) D_2 's insurer pays the damages owed to P_2 for the defective insulation.
- (3) D_3 's insurer pays the damages owed to P_3 for the damaged bicycle.
- (4) A government fund, generated through general and targeted taxation, pays for P_4 's reversal of the sterilisation procedure.
- (5) A government fund, generated through general and targeted taxation, pays for P_5 's treatment and recovery.
- (6) A government fund, generated through general and targeted taxation, pays for the treatment and recovery following P_6 's injuries.

With the exception of the first scenario, we would generally accept that there is no injustice where a party, other than the wrongdoer, performs the duty of reparation that arises as a consequence of wrongdoing. That is, we would accept that third parties are able to discharge duties of reparation that, according to the previous section, at least appear to be duties that are agent-relative to the wrongdoer.

The first scenario is nonetheless distinct. This is because *both* the *content* and the *basis* of the duty of reparation are agent-relative. The reason why another newspaper or another newspaper columnist is unable to discharge the duty of reparation that follows the publication of a defamatory statement is because another newspaper or newspaper columnist is unable (or much less able) to annul, rectify or correct the loss suffered. Put in terms of Gardner's framework, D_1 printing a retraction of the defamatory statement is the "best still-available" means of "conformity with the reason why one had the obligation" not to defame P_1 . Or, in terms of Coleman's framework, an agent-relative duty to print a retraction follows from the annulment norm since the retraction is the best way to annul or rectify the wrongful loss suffered by P_1 . Hence, the content of the duty is agent-relative: only D_1 is able to undertake what is required to correct or annul the loss. In addition, the duty is also agent-relative in terms of the basis of the duty. That is (in terms of Coleman's framework), the duty follows from the relational norm; a "framework of rights and responsibilities" that generates "reasons for acting we have as a result of our actions". Or (in terms of Weinrib's framework), P 's normative loss is correlative with D 's normative gain. The duty to retract the defamatory statement is agent-relative in the strictest sense, since both the content and basis of the duty is agent-relative.

In the remaining scenarios, the *basis* of the duty of reparation is agent-relative but the *content* of the duty is not necessarily agent-relative. In the second and third scenarios, D 's insurance company discharges the duty of reparation. With these circumstances in mind, Gardner suggests that the principle of corrective justice is not limited to regulating "the actions of the person from whom the transfer is to be made back", but rather, the principle can govern "another person acting

68 SR Perry "The Moral Foundations of Tort Law" (1992) 77 Iowa Law Rev 449 at 497.

on behalf of that person".⁶⁹ Hence, in scenarios 2 and 3, D's insurance company acts on behalf of D when the company compensates P. Gardner suggests that it is possible for an agent to act on behalf of another, such that the wrongdoer can be regarded as having adhered to the norms of corrective justice even though it was the agent that provided compensation. Such vicarious agency "depends on the existence of norms that empower one agent ... to act in the name of another".⁷⁰ The duty of reparation is still discharged "in the name of" D since the existence (or basis) of the duty is owed to D's wrongdoing. How the content of the duty is discharged is not, in comparison, agent-relative since a third party (in these scenarios) is able to pay the damages that correct, rectify or annul P's loss.

The fourth, fifth and sixth scenarios represent a departure from the corrective justice principle in favour of a principle of distributive justice. To understand this transition, Coleman asks us to "distinguish between the grounds of the duty and the institutional mechanisms that are permissible ways of implementing the duty."⁷¹ That is, we should differentiate (just as we have been doing) between the basis and the content of the duty. In terms of the grounds (or bases) of the duty, a "victim's wrongful loss may give her a right to recover."⁷² Her wrongful loss and right to recover, as we know, "is part of the normative basis for imposing a duty to repair."⁷³ However, the "nature and scope of the duty depends on the practices in place" for implementing the duty.⁷⁴ Although for Coleman "corrective justice links agents with losses" and "provides individuals agent-relative reasons for acting", such agent-relative reasons for action may be "superseded by other practices that create reasons for activity ... such practices sever the relationship between agents and losses".⁷⁵

Hence, in scenarios 4, 5, and 6, "if [P] recovers from treasury, [P] no longer has a moral right to recover from [D]" since "whether or not corrective justice in fact imposes moral duties on particular individuals is *conditional* upon the existence of other institutions for making good victims' claims to repair".⁷⁶ The existence of a compensation scheme within a community pre-empts P's claim against D that would otherwise be based on the principle of corrective justice. Hence, where a comprehensive compensation scheme is in place, "corrective justice itself imposes no duties" within that community.⁷⁷ The existence of the scheme therefore severs the *basis* of the duty of reparation.

69 John Gardner "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) *L & Phil* 1 at 10.

70 John Gardner "Some Types of Law" in D Edlin (ed) *Common Law Theory* (Cambridge University Press, Cambridge, 2007) 51 at 58.

71 JL Coleman "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Rev* 427 at 443: "Even if the injurer has the duty to repair in justice, it does not follow that justice requires that the duty be discharged by the injurer. We need to distinguish between the grounds of the duty and the institutional mechanism that are permissible ways of implementing the duty."

72 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

73 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

74 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

75 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

76 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 402.

77 JL Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

Similarly, for Weinrib, if the law adopts "compensatory goals" then such goals "cannot fit within" corrective justice.⁷⁸ "Because compensation reposes its justificatory force solely on the plaintiff's exigence in the aftermath of injury", Weinrib explains, "it applies to the plaintiff independently of the defendant".⁷⁹ It follows that there is no "bilateral" link between the injured and the injurer and the need for compensation "relates to the injured party to others (however many there are) who are similarly exigent and thus have similar claims as a matter of *distributive* justice".⁸⁰ In other words, if P's wrongful loss is no longer necessarily tied to D's wrongdoing, then P's loss (and all other similar losses) are burdens that require just distribution. Once isolated from D's wrongdoing, the significance of P's losses only raise questions of distributive justice.

The existence or basis of the duty of reparation that is imposed on D therefore depends on how we conceptualise and configure P's loss. As mentioned, Weinrib's theory is concerned with "normative" gains and losses (as compared with "factual" gains and losses). "The factual aspect of a gain and loss", Weinrib explains, "refers to the effect of the interaction on the amount of condition of one's holdings".⁸¹ For instance, a bodily injury that is occasioned without fault (innocently) represents a factual loss; the pain, suffering or disability is a material impairment to the person.⁸² A normative loss, in comparison, is measured as against a norm that "set the terms of a fair interaction".⁸³ In normative terms, a bodily injury that is occasioned innocently (in adherence to the terms of fair interaction) renders neither a normative loss nor normative gain, whereas a bodily injury that is occasioned negligently (in contravention of the terms of fair interaction) renders a normative gain and a normative loss.

Note how Weinrib introduces agent-relative considerations into his account of "loss": loss should be measured with reference to a norm, and that norm ought to govern the terms of fair interaction between two people. In other words, Weinrib's notion of wrongful loss is a relative notion of loss: the particular loss ought to be "regarded as wrongful *vis-à-vis* the injurer whose wrong or wrongdoing caused it".⁸⁴

It is also necessary, Perry argues, to interpret Coleman's theory in the same manner.⁸⁵ Recall that the annulment norm requires the elimination, rectification or annulment of wrongful "losses". "For the purposes of grounding a duty of repair", Perry suggests that the "loss" that requires annulment ought to be "characterised as wrongful with reference to a particular wrongdoing that

78 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 121.

79 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 121.

80 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 121.

81 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 115.

82 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 116.

83 EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 115–116.

84 SR Perry "The Mixed Conception of Corrective Justice" (1992) 15 Harv J L & Pub Pol'y 917 at 922.

85 SR Perry "The Mixed Conception of Corrective Justice" (1992) 15 Harv J L & Pub Pol'y 917 at 922: "If casual agency constituted a sufficient basis for a duty to repair a wrongful loss, the wrongfulness of which was completely unconnected with the nature of the agent's conduct, why would it not ground a duty whether the loss was 'wrongful' or not?"

causally contributed to it".⁸⁶ Hence, the "loss" that Coleman's annulment norm is concerned with — and ultimately the loss that corrective justice is concerned with — is a normative loss that is wrongful *vis-à-vis* D's wrongdoing. It is this relativist conception of wrongful loss that is ultimately the *basis* of agent-relative duties of reparation under the principle of corrective justice. Since corrective justice presupposes an equality between P and D (with regards to a particular quality or pre-existing norm), an inequality between P and D — that calls for correction — only arises if the wrongfulness of the loss that is suffered by P is somehow related to D.

The alternative conception of wrongful loss is an absolute conception; that a particular loss is "wrongful *tout court*" or "wrongful *vis-à-vis* the world at large".⁸⁷ If we view P₄'s medical misadventure, P₅'s respiratory disease, and P₆'s cycling collision as each involving a "wrongful loss" where the "wrongfulness" of the loss is determined by a norm that is isolated from D₄'s, D₅'s and D₆'s causal contribution to the loss, then we can begin to unlock tort law's "reciprocal normative embrace". That is the effect of the Woodhouse Report's "double argument" (or any sound argument) under the umbrella of community responsibility: the loss suffered by P is *wrongful* as measured against a standard that is independent of D (such as norms of reciprocity, risk-distribution and equity). It then follows that the fault principle is inapplicable. In particular, the components of the fault principle, such as an objective assessment of D's conduct and D's responsibility for the outcome of D's conduct, become irrelevant to the remedial response to absolute wrongful loss. Moreover, once the fault principle is rendered irrelevant, the broader notions of corrective justice begin to "hold no sway".⁸⁸

Given that the fault principle is a sound evaluative standard, which has been displaced by the reconfiguration of wrongful loss, it is tempting to engraft the fault principle onto principles of justice other than the principle of corrective justice. For instance, since fault is concerned with wrongdoing, it may be tempting to engraft the fault principle onto the principle of retributive justice. Yet, we can readily anticipate a problem. In order to engage a principle of retribution it is necessary to find that the conduct was not only wrongful (breach of an objective duty) but also the wrong thing to do (an unjustifiable act). This is because the principle of retribution, which aims to impose a loss or burden on D that is proportionate to D's blameworthy conduct, ought to only apply where the conduct attracts moral censure. A further finding, beyond objectively-assessed fault, is therefore required in order identify when D's wrongdoing also amounts to blameworthy conduct. Often, the additional finding will require inquiry into the subjective aspects of D's conduct, beyond objective questions of care and attention and into subjective questions of recklessness, wilful blindness, and so on. In such instances, the remedial response has moved beyond the remit of the fault principle and into questions of culpability.

86 SR Perry "The Mixed Conception of Corrective Justice" (1992) 15 Harv J L & Pub Pol'y 917 at 923.

87 SR Perry "The Mixed Conception of Corrective Justice" (1992) 15 Harv J L & Pub Pol'y 917 at 922.

88 G Palmer "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 UTJLJ 223 at 247.

It is also tempting to engraft the fault principle onto the principle of distributive justice. For instance, a compensation scheme may require that the community shares the responsibility for the costs of personal injury whilst allocating the proportion of responsibility in a way that those who *cause* the personal injuries bear a larger share of the cost. However, care needs to be taken as to what is meant by "cause" in this context. On one reading, those who are engaged in risk-laden activities, such as drivers, surgeons and home insulators, collectively cause personal injuries, and therefore ought to bear a larger share of the costs. On a slightly more strict reading, particular individuals, such as D_4 , D_5 and D_6 , may be causally responsible for personal injuries, and therefore ought to bear a larger share of the costs. On either reading, to "causally contribute to a loss" is still distinct from a loss "being wrongfully occasioned". The fault principle, after all, is concerned with fault. Absent a finding of fault, the fault principle is not engaged in this context.

Perhaps then a compensation scheme could require that the community shares the responsibility for the costs of personal injuries (however occasioned) whilst allocating the proportions of responsibility in a way that those who *wrongfully-occasioned* personal injuries bear a larger share of the cost. Under such a scheme, Waldron observes, "the nexus between causation and liability is not regarded as essential; it just happens to be the method we have adopted for ensuring that those who expose others to risks are exposed to substantially the same risk themselves".⁸⁹ D 's fault may therefore be one criterion, among other criteria, for determining the just distribution of costs associated with personal injuries between a number of potential cost-bearers. Yet, whilst the scheme is concerned with distributing proportions of the overall cost, the fault principle is still not engaged in this context. This is because D is still not held to be responsible for the outcome of his wrongful conduct, and hence, the component of outcome responsibility remains absent. As we know, outcome responsibility can require D to account for massive losses that follow from D 's wrongdoing. The requirement to account for such massive losses cannot be justified as adhering to a sound principle of distributive justice.

The principle of community responsibility forces a reconfiguration of "wrongful loss" so that the loss that a person suffers following a personal injury is wrongful *vis-à-vis* the community-at-large. Although there may be sound reasons for this reconfiguration, it is at the expense of the fault principle. We therefore abandon the fault principle in this reconfiguration, and abandon the evaluative components of the fault principle: the objective assessment of conduct and the imposition of responsibility for outcomes. The fault principle, and the component evaluative standards, cannot be engrafted onto the application of the principles of retributive or distributive justice: the evaluative standards are irretrievably inapplicable.

5. Conclusion

I stated that the purpose of this discussion is to identify how the provision of a no-fault compensation scheme for personal injuries has displaced the principle of corrective justice. My simplistic answer is that the principle of corrective justice has been displaced through a reconfiguration of the "wrongfulness" of personal

89 Jeremy Waldron "Moments of Carelessness and Massive Loss" in David G Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1997) 387 at 407.

injuries. Once a personal injury is no longer viewed as a loss that is wrongful *vis-à-vis* its wrongful cause, the wrongdoer's conduct and his responsibility for the outcome of his conduct become irrelevant (and remains irrelevant) to the remedial response to wrongfully-occasioned personal injuries. The point is that this reconfiguration, motivated by the principle of community responsibility, is at the expense of the fault principle, and more broadly, at the expense of the normative connection between actions and outcomes.⁹⁰ This is what is "abandoned" through the introduction of a no-fault compensation scheme for personal injury.

90 SR Perry "The Moral Foundations of Tort Law" (1992) 77 Iowa Law Rev 449 at 497.

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